No. 00-1665

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN H. WEHBY, M.D.,

Petitioner,

v.

ANTHONY WARD, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Ohio Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

The sole question presented by the Petition is whether the notice requirements embodied in the due process clause of the Fourteenth Amendment are satisfied by providing service to Petitioner's office address. For the following reasons a writ should be denied in this case. First, Petitioner misstates the facts surrounding the nature of his "former office address." Second, the decision of the trial court does not conflict with any constitutional provision or federal case law since the notice provided was reasonably certain to notify Dr. Wehby of the claims being brought against him. Third, the lower court's decision to not afford relief under Ohio Civil Rule 60(B) was proper and does not raise a constitutional question for review by this Honorable Court. Each of these items will be discussed in turn.

PETITIONER'S MISSTATEMENTS OF FACT

Petitioner misstates relevant facts several times in the Petition. In the question presented to the Court, Petitioner states that service was attempted at his "former employment" that he used "simply as a storage facility." The Court of Appeals for the First Appellate District of Ohio decision (attached in Appendix A) found that the record was clear that:

> . . . [Wehby's] listing in the business pages of the telephone book in 1997, 1998 and 1999 indicated that he was still in practice. He did not have his office phone disconnected. He did not inform Ward or any of his patients that he had retired. He did not remove the sign that advertised his

> practice in front of the Beechmont Avenue office, and a marker next to the door of the Beechmont Avenue property read "John Wehby, M.D."

The Court of Appeals found that Wehby was aware that he was still receiving mail at his business address. Wehby hired a person to sort the mail and advised that employee to save any checks and discard everything else. The Court also found that the Wards had no way of knowing that Wehby no longer practiced and that the mail would not be opened. Dr. Wehby is merely trying to claim ignorance by retroactively stating he was retired and that the office was used as only a storage facility despite all outward appearances to the contrary.

Dr. Wehby also improperly asserts in the Petition that Mr. Ward knew Dr. Wehby's residential address and "on occasion" delivered items to Dr. Wehby's residential address. However, the evidentiary hearing identified that Dr. Wehby asked Mr. Ward to deliver something to his home address on one uncertain, indefinite occasion. The testimony reveals that Mr. Ward never actually visited the residence and nothing in the record provides any indication that Mr. Ward 'knew where appellant maintained his residence.' The factual assertion that Mr. Ward had actual knowledge of Dr. Wehby's residence was rejected by the magistrate, the trial court, and the First District Court of Appeals.

NO CONFLICT EXISTS BETWEEN THE STATE COURT'S DECISION AND THE CONSTITUTION OR ANY FEDERAL CASE

Petitioner correctly cites the case *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) for the proposition that the validity of service depends on whether it is reasonably certain to inform those affected. Petitioner claims that delivering notice to his business address was not reasonably certain because he no longer used it except as a storage facility and Mr. Ward knew his residential address, two statements that are incorrect. Petitioner makes no argument that delivering notice to a business is in and of itself improper. Delivering notice to a business is acceptable when it is reasonably certain to notify the party. Given all the facts, delivering notice to Dr. Wehby's business address was reasonably certain to inform him of the claims against him. All outward appearances suggested that the Beechmont address was still Dr. Wehby's business location and conscious disregard for mail is not a defense to improper notice.

Dr. Wehby cites the case of *Faden v. Insurance Company of North America*, 96 F.3d 792 (5th Cir. 1996) for the proposition that using an address out of a telephone book was not reasonably calculated to notify the defendant. Petitioner fails to mention that in *Faden* notice was sent to the defendant's parent company's address not to the defendant's address as required. The present case can easily be distinguished since notice was being sent directly to Dr. Wehby at his business address. Despite Dr. Wehby's argument to the contrary there is no conflict between the state court's decision in this case and the Fifth Circuit's decision in *Faden*. The Ohio State Courts

have repeatedly ruled that Mr. Ward followed the Civil Rules precisely.

THE OHIO COURT'S DECISION DOES NOT DISTORT RULE 60(B)

Petitioner claims that the Ohio Court erred in its decision to not grant the Rule 60(B) Motion to nullify the default judgment entered against him. Petitioner states that the Court erred in following a Rule 60(B)(1) standard in this case instead of a 60(B)(5) standard. However, the catchall provision of 60(B)(5) cannot be used where facts suggest issues addressed and resolved by 60(B)(1). Even assuming that 60(B)(5) should be followed a meritorious defense must still be made. Petitioner makes a misstatement in his Petition about the requirement for pleading a defense under a Rule 60(B) Motion. For a Rule 60(B) Motion to be granted three factors must be present: (1) a meritorious defense; (2) entitlement to relief under 60(B)(1)-(5); and (3) timeliness of the motion. *GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, 351 N.E.2d 113 (Ohio 1976). Thus, for both 60(B)(1) and (5) a meritorious defense is required. The decision by Judge Davis (attached in Appendix B) clearly shows that at the evidentiary hearing Petitioner offered up no meritorious defense. To the question: "Do you have a defense to the claim made in the case?" Petitioner answered "Yes." There was no further elaboration. It was proper for the trial court to refuse to reopen the evidentiary hearing since Dr. Wehby's due process was not infringed – he had

an opportunity in open court to make his defenses known but failed to do so.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

ANTHONY WARD and LENA WARD,	:	APPEAL NO. C-990846 TRIAL NO. A-9802474
Plaintiffs-Appellees,	:	*JUDGMENT ENTRY.*
vs.	:	
JOHN WEHBY, M.D.,	:	
Defendant-Appellant.	:	

This appeal, considered on the accelerated calendar under App.R. 11.1(E) and Loc.R. 12, is not controlling authority except as provided in S.Ct.R.Rep.Op. 2(G)(1).

Defendant-Appellant John Wehby, M.D., appeals from the order of the Hamilton County Court of Common Pleas overruling his motion either to vacate a default judgment for lack of jurisdiction or to grant him relief from the judgment pursuant to Civ.R. 60(B)(5). We affirm.

In 1992 or 1993, Wehby opened a medical practice on Beechmont Avenue in Cincinnati, Ohio. He treated plaintiff-appellee Anthony Ward on various occasions between 1992 or 1993 and 1997. Wehby claims that, in 1997, he "retired" from the practice of medicine. However, his listing in the business pages of the telephone book in 1997, 1998 and 1999 indicated that he was still in practice. He did not have his office phone disconnected. He did not inform Ward or any of his other patients that he had retired. He did not remove the sign that advertised his

practice in front of the Beechmont Avenue office, and a marker next to the door of the Beechmont Avenue property read "John Wehby, M.D." Wehby continued to receive mail at that address.

Wehby claims that he stopped seeing patients on a regular basis in 1997 and that he used the Beechmont Avenue office only for storage of his antiques. He was aware that mail continued to be delivered there, but he stored the mail, unopened, in one of the rooms of the office. At some point, he hired a person to sort through the mail, to remove any checks written to him, and to discard the rest of the mail unread.

Anthony Ward and his wife, through their counsel, sought the release of Ward's medical records in 1997. Wehby never responded to their letter. In 1998, counsel for the Wards filed a claim for medical malpractice and loss of consortium against Wehby, attempting to serve Wehby at the Beechmont Avenue address by certified mail. The certified mail was returned unclaimed. The Wards' counsel then served the complaint by ordinary mail. That mail was not returned.

Wehby failed to respond to the complaint. The trial court entered a default judgment in favor of the Wards in the amount of $600,000 on May 27, 1999.

On June 21, 1999, Wehby filed a motion to vacate the judgment for lack of proper service or to grant Civ.R. 60(B) relief from the judgment. The motion was heard by a magistrate of the lower court on September 7, 1999. His decision denying the motion was adopted by the trial court on November 4, 1999.

In the only assignment of error raised on appeal, Wehby asserts that the lower court erred by adopting the decision of the magistrate. We are unpersuaded.

Wehby claims that service of process was never properly completed and that the trial court therefore lacked jurisdiction to enter the default judgment. Service of process may be made at an individual's business address so long as such service complies with the requirements of due process.[1] Where service is reasonably calculated to reach the party to be served, the service is constitutionally sound.[2] Thus, it has been held that certified mail service, sent to a business address, complies with the mandates of due process if the circumstances are such that successful notice of the pending action can be reasonably anticipated.[3]

Wehby had maintained an active practice at the Beechmont Avenue address for approximately five years prior to the filing of the complaint and service of process. Wehby testified that he decided to retire from the practice of medicine in 1997, but he retired without notifying his patients, including the Wards. He continued to maintain signs outside of the office and telephone listings for his medical practice, and he purposely ignored all the mail that was delivered there. At the time service was sent to the Beechmont Avenue address, the Wards could have "reasonably anticipated" that Wehby would be notified of

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[1] See *Akron-Canton Regional Airport v. Swinehart* (1980), 62 Ohio St.2d 403, 406 N.E.2d 811, syllabus.

[2] See *Swinehart* at 406, 406 N.E.2d at 814.

[3] See *Id.*

the pending action. The Wards had no way of knowing that he no longer maintained a regular presence at the business address or that he allowed mail to be delivered there without opening it.

The fact that Wehby had actually stopped practicing medicine at the Beechmont Avenue office, without more, did not deprive the trial court of jurisdiction. Because Wehby took no steps to notify his patients in particular or the public in general that he no longer maintained a regular presence at the office, his intermittent presence did not preclude ordinary mail service from being reasonably calculated to notify him of the pending complaint.

Finally, Wehby claims that service at the office address was improper because the Wards were aware of his residence address and never attempted to serve him at that address. As we have indicated above, however, they were not required to do so, even if they were aware of his residence address,[4] so long as the method of service that they chose was reasonably calculated to apprise Wehby of the action. We have held that it was.

Therefore, the judgment of the trial court is affirmed.

Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial

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[4] It is not at all clear from the record that the Wards were aware of Wehby's home address. Wehby testified that he had informed Anthony Ward of his home address so that Ward could deliver something to Wehby's house. However, the fact that Wehby had once in five years told Ward where he lived did not mean that Ward knew Wehby's home address at the time the complaint was filed.

court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDERBRANDT, P.J., DOAN and WINKLER, JJ.

To the Clerk:

Enter upon the Journal of the Court on AUG – 2 2000 per order of the Court /s/ Hildebrandt.
Presiding Judge

APPENDIX B

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ANTHONY WARD, et al.	*	Case No. A9802474
Plaintiffs	*	Judge Davis
vs.	*	MAGISTRATE'S
JOHN H. WEHBY,	*	DECISION ON RULE 60B MOTION
Defendant.	*	

RENDERED THIS 8th DAY OF September, 1999.

This matter is before the court on the Ohio Civil Rule 60B motion filed by the defendant. The court held a hearing in this matter at which several witnesses testified for each side. In addition, the court admitted two affidavits in order to conclude the matter, rather than continue it to a later date. Counsel for the plaintiff did not object to the admission of the affidavits.

From the evidence, it appears that defendant has been a medical doctor, (M.D.) since 1977. He is 53 years old and states that he is now retired from medical practice. Prior to this retirement, he practiced medicine out of his medical office located at 7836 Beechmont Ave., Cincinnati, Hamilton County, Ohio. In the Matter before the court, he treated Anthony Ward during the years between 1982 and 1997. Ward's complaint alleged that defendant negligently failed to diagnose a squamous cell carcinoma on Ward's vocal chord.[1] As a result, Ward suffered from a

[1] This later involved both vocal chords.

more involved form of cancer and was forced to undergo lengthy treatments which if the cancer had been diagnosed earlier, would have been substantially less. Following a lengthy default hearing, the court awarded judgment to Ward in the amount of $500,000.00 and to the spouse Lena Ward in the amount of $100,000.00, see Amended Magistrate's Decision filed herein.

Defendant states that he is an antique buff, buying and selling antiques. He stored many of these antiques at his office located at 7836 Beechmont Ave., Cincinnati, Hamilton County, Ohio. Defendant stopped seeing patients at this office on a regular basis in the latter part of 1997. During 1997, 1998, and approximately half of 1999, defendant continued to rent the premises at 7836 Beechmont Ave. and continued to pay his telephone bill and gas and electric bill for that premises. According to the defendant, he did not go to the office regularly, and mail was placed by the postal carrier in the mailbox or under the door. Upon arriving at the office defendant placed any mail that he found in one of the rooms at 7836 Beechmont Ave. He testified that he did not open any of the mail. At some point in time, the U.S. Postal Service contacted defendant to claim mail that was being held at the Post Office. Later, defendant hired someone to claim all of the mail and weed through it in order to remove any checks. This person was later instructed by defendant to dispose of all other mail.

Procedurally, plaintiffs obtained service by ordinary mail on their complaint being informed that the defendant failed to claim the original certified mail service issued by the Clerk of Courts. This service was made at defendant's office at 7836 Beechmont Ave. Defendant

claims that he never received any service from the Clerk of Courts, that he has never opened any mail from the Clerk of Courts, and that his residence address was discernable if proper efforts were made to find it. It should be noted that the only phone number listed in the Cincinnati phone book for defendant was 7836 Beechmont Ave. Defendant had an unlisted home phone.

This court finds that defendant's contention that he can literally place mail addressed to him in a pile, or just throw it away and not be charged with any responsibility for its contents is without merit. The plaintiffs followed the civil rules precisely. They found that defendant maintained an office with a working phone number. Mail that was delivered to that office was not returned to the sender but just piled up either in the mailbox, the front room of defendant's office or the post office. Defendant's testimony that he hired someone to look for the checks and throw the rest of the mail away merely advances the court's perception that the defendant was acting irresponsibly towards his affairs. This irresponsibility is not excusable neglect under Civil Rule 60B.

Notwithstanding the above, the following is set forth in *Kadish, Hinkel & Weibel Co. L.P.A. v. Rendina*, (1998), 128 Ohio App.3d 349,

> '[T]o prevail on a Civ.R. 60(B) motion, the movant must demonstrate that: (1) [he] has a meritorious defense or claim to present if relief is granted; (2) [he] is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time.' [*GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 1

> O.O.3d 86, 351 N.E.2d 113] at paragraph two of the syllabus.
>
> GTE requires movant to show that he has a meritorious defense. A meritorious defense exists when the movant specifically alleges operative facts that support a defense to the judgment. *See Elyria Twp. Bd. of Trustees v. Kerstetter* (1993), 91 Ohio App.3d 599, 632 N.E.2d 1376, *citing BancOhio Natl. Bank v. Schiesswohl* (1988), 51 Ohio App.3d 130, 131, 554 N.E.2d 1362.
>
> The Ohio Supreme Court has set forth the form that the movant's defense must take. For example, the movant's answer to the original complaint has been held to be a sufficient defense. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 520 N.E.2d 564. Furthermore, in *Rose Chevrolet*, the court held the movant is not required to submit supporting evidence of his defense. *Id.* at 20, 520 N.E.2d at 566-567. However, the movant's allegations must set forth the defense or his evidence must demonstrate that content exists in his allegations. *Elyria* at 602, 632 N.E.2d at 1378-1379. Above all, his allegations must aid the trial court in its decision on the motion.

During the hearing, a question was asked by counsel for the defendant:

> Q. Do you have a defense to the claims made in this case? Defendant responded:
>
> A. Yes.

No further testimony was presented on this issue nor was any proposed answer tendered to the court. This response falls short of the requirements set forth above. In other words, the defense to the claim must somehow

be made known to the court through a proposed answer or through testimony in open court.[2] The content of the answer or such testimony must be sufficient to aid the court in its decision as to whether a valid defense exists. Here, the court heard no such testimony nor did the court hear anything other than an affirmative response to the question set forth above. This fails to satisfy the first prong of the *GTE* case.

Defendant's actions do not rise to the level of excusable neglect under Rule 60(B). In addition, defendant has failed to satisfy the first prong of the *GTE* case.

DECISION

Defendant's motion to vacate the judgment under Ohio Civil Rule 60B is denied.

/s/ Richard A. Bernat
RICHARD A. BERNAT,
MAGISTRATE, COURT
OF COMMON PLEAS

Copies sent by Clerk of Courts to:

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[2] The court is not opining whether there might be other methods of bringing such defenses to the attention of the court.

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NOTICE

Objections to the Magistrate's Decision must be filed within fourteen days of the filing date of the Magistrate's Decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT COPIES OF THE FOREGOING DECISION HAVE BEEN SENT BY ORDINARY MAIL TO ALL PARTIES OR THEIR ATTORNEYS AS PROVIDED ABOVE.

Date: 9/8/99 Deputy Clerk /s/ Deborah A. Long